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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1909.

No. [redacted] 132

JOHN FLANNELLY AND
MARY ELLEN FLANNELLY,
Petitioners,

vs.

THE DELAWARE AND HUDSON
COMPANY,
Respondent.

Brief of Counsel for Respondent

UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JAMES H. TORREY,
Attorney for Respondent.

IN THE

Supreme Court of the United States

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JOHN FLANNELLY & MARY ELLEN FLANNELLY,
Petitioners,

vs.

THE DELAWARE AND HUDSON COMPANY,
Respondent.

UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondent's Brief.

The trial in this case resulted in a verdict in favor of the plaintiffs. An appeal was taken by the defendant to the Circuit Court of Appeals for the Third Circuit, the first four assignments of error being predicated upon the refusal of the Court to give binding instructions to the jury as requested in the points submitted at the conclusion of the trial, as follows:

"FIRST: Under all the evidence, the verdict must be for the defendant."

"*SECOND:* There is no evidence in the case which would warrant a verdict in favor of the plaintiff."

"*THIRD:* The evidence establishes no proof of negligence on the part of the defendant which would warrant a recovery in this case."

"*FOURTH:* The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

The Fifth and Sixth Assignments of Error were predicated upon the refusal of the trial Court to enter judgment for the defendant *non obstante veredicto* upon the rule granted to show cause why such judgment should not be entered.

As is indicated in the brief of the petitioner in this Court, the practice has long prevailed in Pennsylvania of reserving the question of the right of the plaintiff upon the whole record to recover, and in case a verdict is rendered in favor of the plaintiff, the review of the question reserved upon a rule for judgment *non obstante veredicto*. So long as this custom was simply one adopted by the Pennsylvania courts for their convenience, it may be conceded that it was not such a mode of procedure as the courts of the United States sitting within the State were required to adopt and conform to. In 1905, however, the Legislature of Pennsylvania passed a statute regulating the practice in this regard, the title only of which is cited in the petitioner's brief in this case at page 9. The statute reads as follows:

"AN ACT

Authorizing the courts of this Commonwealth to certify the evidence and enter judgment upon the whole

record, whenever a request for binding instructions has been reserved or declined by the trial judge; and authorizing appeals from the judgment so entered, and the entry of the proper judgment in the Supreme or Superior Court."

Section 1. Be it enacted, &c., That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the Court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court.

Approved—The 22nd day of April, A. D. 1905."

It is here contended and has been that the practice so prescribed by statute was binding upon the United States Circuit and District Courts sitting in the State of Pennsylvania, under the provisions of the Act of Congress of June 1, 1872, *R. S., Section 914, U. S. Comp. Stat. 1901, p. 684*, as follows:

"The practice, pleadings, forms and modes of procedure in civil cases other than in courts of equity and admiralty in the Circuit and District Courts shall con-

form as near as may be to the practice, pleadings, forms and modes of procedure existing at the time in like cases in the courts of record in the State within which said Circuit or District Courts are held, any rule of the Court to the contrary notwithstanding."

The trial court recognized the obligation to follow the procedure laid down in this statute and granted the rule for judgment *non obstante veredicto*, which was fully argued with no objection upon the part of the counsel for the petitioner here. The form of the rule as entered was as follows:

"Now, to wit, March 27th, 1908, the defendant, by its attorneys, move the Court to have all the evidence taken upon the trial duly certified and filed and for judgment *non obstante veredicto* upon the whole record; particularly upon the refusal of the request of the defendant contained in its first four points for charge for binding instructions to the jury, in favor of the defendant.

(Signed) WELLES & TORREY,
Attorneys for Defendant."

And endorsed:

"And now, March 27th, 1908, upon motion in open court, rule for judgment *non obstante veredicto* is granted as prayed for, returnable *sec. reg.*

(Signed) R. W. ARCHBALD,
District Judge."

(Record, page 36.)

An appeal having been taken, as above stated, and the errors assigned as herein detailed, elaborate briefs were filed by the petitioner here and oral argument had, no objection being made either in the briefs or the argument to the manner in which the record had been brought into the Court of Appeals, or to the consideration of the case upon the assignments of error as filed.

The judgment having been reversed, the petitioner here filed in the Circuit Court of Appeals a motion for a reargument, with a full brief in which no suggestion was made that the record was defective in its form, or that the issues were such that the Court could not properly consider them. The grounds upon which the reargument was sought were that the Court had erred in its findings as to the effect of the testimony.

We contend that the form in which the issue was framed in the court below and upon appeal having been argued through all its stages without the objection now made, the petitioner should not be heard to introduce the new issue, even if it were meritorious.

THE PRACTICE PERSUED IN THIS CASE WAS PROPER.

The case of Delmas vs. Kemble, 215 Pa. St. 410, cited in the petitioners' brief, is the first case which went to the Supreme Court of Pennsylvania under the statute of 1905, in which the effect of the statute was fully considered. The excerpts from the opinion quoted by the petitioners are less full than could have been desired. We add the following occurring upon pages 411 and 412:

> "The Court has long had authority to direct a verdict for defendant when it was of opinion that the plaintiff, even if all his evidence be believed, has failed to make out his case. But this had to be done offhand at the trial and a mistake of the judge either way resulted in delay and expense.* * *
>
> No doubt when time was not urgent and trials were conducted leisurely, with full argument on every point as it arose, the system worked fairly well. But with

the growing complexity of issues, the constantly increasing pressure upon the trial lists, the taking of testimony in shorthand and the consequent hurry of trials, the inconvenience became burdensome. In practical reforms for facilitating business without impairing settled legal principles Pennsylvania has always been in the front. The authority to reserve questions of law for the consideration of the court *en banc* was first conferred by the Act of March 1, 1825, P. L. 41, upon the judges of the District Court of Philadelphia * * * and extended to the courts of the Commonwealth generally by the Act of April 22, 1863, P. L. 554, together with the power also first conferred on the District Court of Philadelphia to enter a compulsory non suit if the plaintiff's evidence is not sufficient to maintain his action.

The Act of 1905 is another step in the same direction. It broadens the power of the judge in this respect, that whereas heretofore the verdict was required to be for the plaintiff and the reservation to be of leave to enter judgment for the defendant *non obstante*, now what is reserved is a request for binding direction to the jury and may be for either plaintiff or defendant, but though thus enlarged as to include both parties, the power of the judge is the same as it was before. He is 'to enter such judgment as should have been entered upon the evidence,' or in other words to treat the motion for judgment as if it was a motion for binding directions at the trial and to enter judgment as if such direction had been given and a verdict rendered in accordance. What the judge may do is still the same in substance but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. If upon such consideration it shall appear that a binding direction for either party

> would have been proper at the close of the trial the Court may enter judgment later with the same effect."

In the foregoing citation there is reference to the practice of Pennsylvania courts as established by State statute of entering non-suit as analagous to the powers conferred by the Act of 1905.

In the cases cited in the petitioners' brief of Central Transportation Co. vs. Pullman, 139 U. S. 40, and Coughran vs. Bigelow, 164 U. S. 308, it is held that under the United States statute of 1872 the United States Courts sitting in Pennsylvania are bound by the practice as to non-suits regulated by the State statute. By analogy the Court should hold that United States Courts sitting in Pennsylvania are equally required to follow the practice with reference to judgments *non obstante veredicto* prescribed by the Act of 1905.

There was no invasion in this case of the province of the jury. The Circuit Court of Appeals found that the case was one which would have required the judge to direct a verdict for the defendant on the ground of contributory negligence. That being the case the Court should have entered judgment for the defendant *non obstante veredicto* and failing to do so should be reversed.

EVEN IF THE PRACTICE OF ENTERING JUDGMENT *NON OBSTANTE VEREDICTO* WERE ERRONEOUS, IT WOULD IN THIS CASE BE HARMLESS ERROR.

The opinion of the Circuit Court of Appeals concludes as follows:

> "Her" (Mrs. Flannelly's) "uncontradicted statements disclose contributory negligence on her part. There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence. As there was nothing to warrant such a verdict the motion for judgment *non obstante veredicto* should have been granted. The judgment below must be reversed, with costs, and it is so ordered."

Recurring once more to the assignments of error in the Circuit Court of Appeals, the Fourth Assignment complains of the Court's refusal to charge the jury as follows:

> *"FOURTH:* The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

The Circuit Court of Appeals in its opinion, as above cited, says:

> "Her uncontradicted statements disclose contributory negligence on her part."

Consequently, if it had been argued by the petitioner here that the Court below had no right to grant a rule for judgment *non obstante veredicto* and that the Circuit Court of Appeals had no right to review its disposition of such a rule, the result would evidently have been that the Fourth Assignment of Error would have been sustained and the same judgment of reversal entered.

All of the assignments of error in substance complain that the case made out by the plaintiffs did not justify its submission to a jury, but that binding instructions for the defendant should have been given. The Court of Appeals

sustained this position, and it is a matter of no moment in what form of words it expresses its conclusion. After a careful and conscientious review of the theory and evidence of the plaintiff, disregarding altogether the evidence upon the part of the defendant, the Court of Appeals reached the conclusion that under the plaintiff's own showing she was guilty of such contributory negligence as barred a recovery. Having reached this conclusion, there was nothing to do but reverse the judgment and enter judgment for the defendant.

THE CONCLUSIONS AND JUDGMENT OF REVERSAL OF THE CIRCUIT COURT OF APPEALS WERE FULLY JUSTIFIED BY THE RECORD AND THE DECISIONS OF THIS COURT.

As has been already pointed out, in reaching its conclusion that the plaintiff, Mary Flannelly, was guilty of contributory negligence, the Circuit Court of Appeals considered only the testimony of the plaintiff and her witnesses and disregarded wholly the mass of testimony offered by the defendant. The effect of the defendant's testimony was that the defendant was in no way negligent in the operation of its trains, but that all signals were duly given; that the plaintiff was in no respect injured, but safely jumped from her wagon before its wheel was struck by the train. All this and much other testimony of the defendant was wholly disregarded, as it must be, the verdict of the jury settling the facts in favor of the plaintiff so far as they were disputed.

The Circuit Court of Appeals, however, in reaching its conclusion, applied the doctrine of this Court as stated in *Phoenix Mutual L. Ins. Co. vs. Doster, 106 U. S. 30-32*, as follows:

> "It is well settled that the Court may withdraw a case from a jury altogether and direct a verdict for the plaintiff or the defendant as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it."

This doctrine is frequently recognized and enforced in other decisions of this court. (See *Griggs v. Houston, 144 U. S. 553; Randall v. B. & O. R. R. Co., 109 U. S. 478-482; Anderson County Commissioners v. Beal, 113 U. S. 227-241; Schofield v. Chicago, M. & St. P. R. R. Co., 114 U. S. 615-618; Elliott v. Chicago, M. & St. P. R. R. Co., 150 U. S. 245; Patton v. Texas & Pacific R. R. Co., 179 U. S. 658.)*

THERE WAS NO EVIDENCE NOR REASONABLE INFERENCES FROM THE EVIDENCE WHICH RAISED A QUESTION OF FACT FOR THE JURY AS TO CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF BELOW.

The petitioners' motion for a reargument in the Circuit Court of Appeals was substantially based on the contention now made here that there was evidence sufficient to go to the jury to the effect that the train which obstructed Mrs. Flannelly's view was not a moving train but was standing still upon the track nearest to her.

It is not conceded that she would be relieved of the charge of contributory negligence even if that were so.

That it was substantially conceded that it was not a

standing but a moving train is demonstrated by the following excerpts from the brief of the counsel for the petitioners filed upon appeal in the Circuit Court of Appeals.

> "While she stood there looking and listening, a train composed of high box cars made its appearance around the corner coming from the direction of Scranton going towards Pittston, which would be south, *and slowly pulled over* on and upon the switch track next to her standing horse and on down the crossing in front of her on the track she must first cross. *Mrs. Flannelly waited until the hind end of the freight train had passed her a sufficient distance to allow another view of the track to the South*" (page 2).

> "So that when this woman stood with her rig facing the track with the desire to cross there were two trains with two engines at her back and at least two and possibly three different heavily loaded freight and coal trains *passing in front of her horse's head*" (page 3).

> "While they stood waiting at the usual stopping place a train of defendant composed of *box cars passed the crossing* on the track nearest her going towards Pittston" (page 5).

> "The train on the nearest track to Mrs. Flannelly *was moving slowly south*" (page 6).

> "*After this train of box cars had pulled past the crossing* to the south it cut off her view way down the road, as testified by her in response to a question on cross-examination" (page 10).

> "Furthermore, the train of box cars on the nearest track to Mrs. Flannelly, the approaching flyer which did the damage, and the other trains about her *were constantly on the move*" * * *

> "It is not always contributory negligence *per se* for a person to attempt to cross a railroad track without waiting for a train which *has just passed* to have gone so far as to leave an unobstructed view of another train approaching on a parallel track in a contrary direction" (page 13).

In reviewing the case of the West Jersey Railroad vs. Ryan, counsel says:

> "That case is very different from the one under consideration where the traveler, a woman, drives up a hill to the usual stopping place, stops there, has a lengthy view of the tracks to the south, and there is no train upon them, waits there until two trains come from the north, proceeding to the south, pass the crossing, *still waits until the hind end of the train on the tracks nearest her is some distance from the crossing,*" (etc. page 27).

> "She had stopped and looked and listened at the usual stopping place and is positive that the train which damaged her is not yet within the possible range of vision. Other trains then appear and she waits *till they pass the crossing*" (page 31).

We have carefully re-read this original brief and can find nowhere between its covers any suggestion that the train upon the first track was standing, to offset the above numerous assertions that it was moving, passing, "receding."

Neither is the contention that the train was standing supported by the evidence of the witnesses whose testimony is quoted in the brief for petitioners. On cross-examination Witness William White (record page 112) says:

> "They could have been moving or not. I could not say."

Witness Alice Ahearns says:

"Q. You could not be sure that it was not moving?
"A. I don't think it was moving."

The plaintiff herself clearly testified that it was a moving train which did not stop and she is substantially corroborated by all the witnesses on both sides and her testimony so corroborated furnished the basis for the theory upon which the case was at all times argued by the petitioners' counsel until the opinion of the Circuit Court of Appeals seemed to make necessary the adoption of some other theory of the facts.

We submit that the case has been thoroughly and carefully considered; that it was decided strictly in accordance with the practice of the courts as prescribed by the Pennsylvania statutes, upon the proper principles of law as determined by a long line of decisions of this Court; and that no question is presented which requires or invites a review by this Court.

Respectfully submitted,

JAMES H. TORREY,

Attorney for Respondent.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

JOHN FLANELLY and
MARY ELLEN FLANNELLY,
Plaintiffs-in-error,
vs.
THE DELAWARE AND HUDSON COMPANY,
Defendant-in-error.

No. [redacted] 13

MOTION TO ADVANCE.

Now come the plaintiffs-in-error and respectfully move the court to advance this cause for an early hearing.

FRANK W. HACKETT,
Attorney for Plaintiffs-in-error.

NOTICE TO COUNSEL FOR DEFENDANT.

TO JAMES H. TORREY, ESQ.

Sir: Be pleased to take notice that on Monday, December 13th, or as soon thereafter as we may be heard, I shall move the court to advance this cause for hearing.

FRANK W. HACKETT,
Attorney for Plaintiffs-in-error.

The defendant-in-error admits service of this notice and makes no objection to the motion.

THE DELAWARE AND HUDSON COMPANY,
By JAS. H. TORREY,
Counsel for Defendant-in-error.

Scranton, Pa., Dec. 7th, 1909.

BRIEF.

1. The chief point to be determined is the right of the Circuit Court of Appeals of the Third Circuit to reëxamine facts tried by a jury, and to go over the entire testimony upon writ of error, where no bill of exceptions had been taken below. The trial court refused to grant a motion by the defendant for judgment, notwithstanding verdict against the company. The Circuit Court of Appeals have reëxamined the facts, and reversed the judgment. This we say that court had no right to do. To reëxamine the facts that had been found by the jury was to violate the seventh amendment of the Constitution. The Circuit Court of Appeals had no jurisdiction, we contend, to reverse the judgment below.

The railroad system of Pennsylvania covers so large a territory, and is engaged in such an enormous amount of traffic, that damage suits in the Federal courts against railroad companies are likely to be numerous. The point involved in this case is one that may frequently be taken in those suits. An early determination by this court is of enough public importance, therefore, to justify our petition for a speedy bringing of the question to trial.

2. In addition to the public interest attached to a decision of this point of law, we may be permitted to mention the circumstance that our suit is for personal injuries inflicted upon individuals of very humble means. It is of a class of actions where the evils of delay are severely felt. Such actions are not likely to reach the highest court unless they possess at least some merit.

We feel encouraged to believe that this Honorable Court can readily grant our request, and not thereby infringe in the slightest degree upon the rights of parties to other suits upon the calendar.

Respectfully submitted,

FRANK W. HACKETT,

For Plaintiffs-in-error.

Supreme Court of the United States.

JOHN FLANNELLY AND
MARY ELLEN FLANNELLY,
Petitioners, etc.
vs.
THE DELAWARE AND HUDSON COMPANY,
Defendants.
} No. 132.

Upon Certiorari to Circuit Court of Appeals, Third Circuit.

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

Action in the Circuit Court for the Middle District of Pennsylvania against a railroad company for injuries resulting from negligently running a train, at a high rate of speed, across a public highway, without warning. Plaintiffs were husband and wife. Verdict for plaintiffs. Defendant moved for judgment, *non obstante veredicto*, upon the whole record (Rec., 36). Motion denied, and defendant excepted (Rec., 42). Defendant had likewise moved for a new trial, which motion the trial judge overruled; and defendant did not take an exception (Rec., 40 *et seq.*).

Defendant took up the entire record (including all the evidence) to the Circuit Court of Appeals. That court reversed the judgment of the trial court (Rec., 451).

Our brief, hitherto filed upon petition for *certiorari*, contains a full statement of facts. We, therefore, respectfully

refer to that brief (pp. 2–4) for further statement of facts instead of reprinting the same here.

Assignment of Errors.

The Circuit Court of Appeals erred—

1. In taking jurisdiction of the cause upon writ of error allowed for exception to order of trial court, denying motion for judgment for defendant, notwithstanding verdict rendered for plaintiffs.

2. In reversing judgment of trial court after that court had denied a motion for judgment for defendant *non obstante veredicto.*

Points of Law.

We repeat here the points of law upon which we relied in the earlier brief, as follows:

1. The Circuit Court of Appeals had no jurisdiction to proceed upon the writ of error, there being no question of law to review.

2. The Circuit Court of Appeals reëxamined a fact tried by a jury, namely, that of the alleged contributory negligence of plaintiff Mary Flannelly in driving over the railroad track, the jury having found that Mary Flannelly, plaintiff, was not negligent. This reëxamination the court conducted otherwise than according to the rules of the common law.

3. The Circuit Court of Appeals did not treat the question of contributory negligence as a question of fact for the jury.

The language of the seventh amendment of the Constitution is familiar to the Court:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law."

Since the decision in *Parsons* vs. *Bedford*, 3 Peters, 433, it has been settled that an Appellate Court of the United States can proceed no farther than to grant a new trial; and this is done upon appeal from a motion for a new trial, upon bill of exceptions. The law on this point was recently again stated by Mr. Justice GRAY, in an opinion dealing with the subject of trial by jury, that recites the history of the origin of the seventh amendment. *Capital Traction Co.* vs. *Hof* (1898), 174 U. S., 1.

> "It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that * * * when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reëxamined in any court of the United States otherwise than according to the rules of the common law of England; that by the rules of that law no other mode of reëxamination is allowed than upon a new trial, either granted by the Court in which the first trial was had, or to which the record was returnable, or ordered by an appellate court for error in law (page 13)."

In Pennsylvania an innovation in practice was ventured upon, a few years ago, and in 1905 the following statute went into operation, as appears from a recital in 215 Pa. St., 411:

> "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may * * * move the court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court * * * to enter such judgment as should have been entered upon that evidence."

It was conceived that this wide departure from the common-law rule would expedite the trial of causes. Whether

it does so or not, or whether it works out substantial justice or not, are questions which do not concern us. It is enough to say that the new practice has changed the common-law rule. "The Act of 1905," says Judge GRAY, of the Circuit Court of Appeals, "enlarges the scope of the common-law motion for judgment for plaintiff, notwithstanding the verdict for the defendant, by permitting it to be made by either plaintiff or defendant, when the verdict is against either." *Fries-Breslin Co.* vs. *Bergen*, 176 Fed. Rep., 81.

The cardinal point here is that the Appellate Court, instead of granting a new trial, has ordered a judgment for the defendant, notwithstanding that a jury had rendered a verdict for the plaintiffs. In so doing the Court of necessity reëxamined a fact tried by the jury, and proceeded in a manner not known to the common law at the date of the adoption of the seventh amendment to the Constitution. This is precisely what the seventh amendment forbids.

Our declaration alleges that the plaintiff, Mary F., was "with due care" attempting to drive across, etc. (Rec., 7). This fact was determined by the jury, after a full explanation by the presiding judge of what was plaintiff Mary F.'s duty in respect to carefully looking and hearing. "If she went forward in that way before she had made a proper observation, or taken a position to see what was coming, she took the risk, and the fault is her own" (Rec., 29). "You must decide * * * that Mrs. Flannelly was free from contributory negligence, or negligence on her part, or you cannot find in her favor" (Rec., 30).

The presiding judge, in denying the motion for judgment for defendant *non obstante veredicto* says of the jury:

"The rule with regard to contributory negligence having been fully explained to them it must be assumed that they properly applied it and found that the plaintiff did not drive on to the tracks until she had waited a suitable time so as to have a sufficient view and be able to make such an observation as was required of her before doing so" (Rec., 38).

Mr. Justice BRADFORD, speaking for the Circuit Court of Appeals, makes it evident that the Court entered upon an examination of this question of fact anew, in order to find out whether the Court of Appeals should or not agree with the conclusion reached by the jury upon the fact of due care having been exercised by Mrs. Flannelly. The jury found that Mrs. Flannelly *did* observe due care; the Circuit Court of Appeals—that she did not. "She failed to observe due care" (Rec., 461).

This method of a reëxamination of the facts by an appellate court, after a verdict of the jury below, may be agreeable to the State practice in Pennsylvania, and it may have become so much a matter of custom there as to justify the profession in believing it to be fruitful in good results; but it cannot be sustained in courts of the United States, in face of the plain terms of the seventh amendment to the Constitution.

We submit that the order of the Circuit Court of Appeals should be reversed, and direction given to that Court to enter the proper order affirming, with costs, the judgment of the trial court in favor of the plaintiffs.

PAUL J. SHERWOOD,
For Petitioner.

FRANK W. HACKETT,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 132

Office Supreme Court, U. S.
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John Flannelly and Mary Ellen Flannelly, Petitioners, etc.

vs.

The Delaware and Hudson Company.

No. 132

Upon Certiorari to Circuit Court of Appeals, Third Circuit

BRIEF FOR RESPONDENT

W. S. OPDYKE,
LEWIS E. CARR,
JAMES H. TORREY,
Of Counsel.

WELLES & TORREY,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 132.

JOHN FLANNELLY AND MARY ELLEN FLANNELLY,
Petitioners,
vs.
DELAWARE & HUDSON COMPANY.

Certiorari to the Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE DELAWARE & HUDSON COMPANY, RESPONDENT.

This was an action of trespass brought in the Circuit Court of the United States for the Middle District of Pennsylvania by John Flannelly and Mary Ellen Flannelly, his wife, to recover for personal injuries to the wife alleged to have been sustained by her in a collision between the vehicle in which she was riding, herself being the driver, and a train of the defendant at a grade crossing

of the highway and the railroad, due, as alleged by the plantiff, to the negligent operation of the railroad by the defendant. Under the Statute of Pennsylvania followed in this case damages of the husband and wife for physical injury to the wife must be sued for in a joint action. The case was tried before a jury which rendered a verdict of five hundred ($500) dollars for the husband and two thousand ($2,000) dollars for the wife.

Following the practice prescribed by an Act of the Legislature of Pennsylvania approved the 22nd day of April, 1905, a complete copy of which is appended as Exhibit A to this brief, the defendant at the close of the trial submitted the following requests for instructions to the jury:

> "First--Under all the evidence, the verdict must be for the defendant."
>
> "Second—There is no evidence in the case which would warrant a verdict in favor of the plaintiff."
>
> "Third—The evidence establishes no proof of negligence on the part of the defendant which would warrant a recovery in this case."
>
> "Fourth—The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

which were refused by the Court and an exception taken and bill sealed before the rendition of the verdict (R. 35).

As required by the Act, after the rendition of the verdict the defendant moved to have all the evidence taken upon the trial duly certified and filed and for judgment *non obstante veredicto* upon the whole record, particularly upon the refusal of the above points. Order and rule for judgment were accordingly granted (R. 36). The evidence was duly certified and filed and so became part of the record (R. 431). This rule for judgment *non obstante veredicto* was subsequently discharged and judgment was entered upon the verdict (R. 440).

From this judgment an appeal was taken to the Circuit Court of Appeals for the Third Circuit wherein the same was fully heard and in due course the opinion of the Court was filed by Bradford, District Judge, in which it was concluded that there was nothing in the case to warrant a verdict for the plaintiffs; that the motion for judgment *non obstante veredicto* should have been granted, and thereupon the judgment was reversed with costs (R. 441-445).

An application for re-argument of the case in the Circuit Court of Appeals was presented and refused (R. 476).

Subsequently plaintiffs applied to this court for a writ of certiorari which was granted and a writ issued October 19th, 1909 (R. 476).

ARGUMENT.

The errors assigned in this case raise but two questions:

1. Had the Circuit Court of Appeals jurisdiction to entertain the writ of error which was allowed and heard by it?

2. Did the Circuit Court of Appeals err in reversing the judgment of the trial court and entering judgment for the defendant *non obstante veredicto.*

We contend upon these questions:

First—The Pennsylvania Act of 1905 (Appendix A to this brief) is a valid Act applicable by the Conformity Act of Congress to courts of the United States within the State of Pennsylvania.

Second—Independently of the Act of Assembly the Circuit Court of Appeals had power to reverse the judgment upon the defendant's fourth specification of error in the cause as it came before that court.

Third—The Circuit Court of Appeals having found vital error in the submission of the case to the jury could at least have reversed with venire facias de novo and should still be given the opportunity to enter such judgment if this Court should find the judgment actually entered erroneous.

As preliminary to the discussion of these points, we remark that the jurisdictional question is raised for the first time in this court.

The application of the Seventh Amendment to the Constitution to this case was never invoked until the petition was filed in this case. After the rendition of the verdict, rule for judgment *non obstante veredicto* under the Statute was granted (R. 36).

It appears from the opinion of the Court discharging this rule that it was argued without question of the authority of the Court to make it absolute. (See opinion of the Court, R. 37.)

A writ of error was allowed to the Circuit Court of Appeals (R. 432) upon assignments of error raising the question of the action of the Court discharging the rule for judgment *non obstante veredicto* (R. 41-42).

The case was argued in the Circuit Court of Appeals without question as to the jurisdiction of that court to entertain the appeal as appears from the points covered by the opinion of that Court (R. 441).

The petitioner filed a motion and reasons for re-argument in the Circuit Court of Appeals, which appear in extenso (R. 446-457). Nowhere in that motion or the reasons therein assigned for a re-argument, is there the remotest suggestion that the

court was without jurisdiction to hear the cause or enter the judgment which had been previously ordered.

It therefore appears clearly that the Constitutional and jurisdictional question now raised was never raised at any stage of the proceedings until the petition was filed in this court. The petitioners submitted to the jurisdiction and orders of the Court upon the merits of the case through all its stages until nothing was left to them but the recourse to the jurisdictional question which they then raised for the first time.

It may be that the mere fact that the question was not earlier raised does not preclude its consideration by this court, but it clearly requires that the argument in support of the point as now raised should be closely scanned and suggests that it is an afterthought when all other resources were exhausted.

We argue:

FIRST—THE PENNSYLVANIA ACT OF 1905 (APPENDIX A TO THIS BRIEF) IS A VALID ACT APPLICABLE BY THE CONFORMITY ACT OF CONGRESS TO COURTS OF THE UNITED STATES WITHIN THE STATE OF PENNSYLVANIA.

The first case in which the provisions of the Statute were considered by the Supreme Court is *Del-*

mas vs. Kemble, 215 Pa. 410, in which the effect of the Statute is fully considered and its conformity to the previous practice of the courts and its tendency to limit and expedite litigation are clearly shown.

The appellate courts of Pennsylvania have ever since availed themselves freely of the provisions of the Act to end litigation. In the latest volume of State Reports issued, 230 Pa., appear the following cases in which under the provisions of this Act judgment in favor of the plaintiff was reversed and judgment entered *non obstante veredicto* for defendant:

Joyce vs. Baltimore & Ohio R. R. Co., 230 Pa. 1.

Rocap vs. Bell Telephone Company, 230 Pa. 597.

The applicability of the Statute to the United States courts in Pennsylvania was first considered in the case of *Fries-Breslin Co. vs. Bergen, 168 Fed. Rep. 360,* where after verdict for plaintiff upon a rule for judgment *non obstante veredicto* the Court, Holland Judge, after full consideration of the Act of 1905 and its application to the federal courts, the verdict was set aside and judgment was entered *non obstante veredicto.*

The question came clearly before the Circuit Court of Appeals for the Third Circuit in the case of *Smith vs. Jones, 181 Fed. Rep. 819, 104 C. C. A. 329.* The opinion of the Court in this case by Buf-

fington, J., is so full and convincing that it deserves to be fully quoted.

> "It is contended, however, that the Court below was without power to enter a judgment in favor of the defendants *non obstante veredicto* in pursuance of the Pennsylvania practice Act of April 22, 1905 (P. L. 286). In Fries-Breslin Co. vs. Bergen, 176 Fed. 76, this Court held that:
>
> 'Under the conformity provisions of section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), the Circuit Court was required to recognize the practice authorized by the said Pennsylvania Act of 1905; there being nothing incongruous therein with the organization of the Federal Courts of their settled rules of procedure.'
>
> In view of the able argument made in the present case in support of an opposite view, we have re-examined the question but find no reason to differ from our former conclusion. The practice of entering judgments *non obstante veredicto* has long existed in Pennsylvania, and it enables the case to be concluded by a verdict, while the entry of judgment thereon is made dependent on the Court's opinion on a reserved question of law. This permits the judge to give to the decisive law question on which a case turns a more careful examination than he can do in stress of trial. Moreover, if an appellate

court on review of such judgment finds error, it can reverse and direct entry of judgment for the other party and avoid a retrial. Long experience in this practice has convinced the bar and bench of the State of its value in conducing to a more careful and deliberate consideration of the law by the trial judge to the avoidance of retrials. The practice in Pennsylvania is of statutory origin, as stated by Judge Acheson in Casey vs. Pennsylvania Asphalt Co. (C. C.), 109 Fed. 746, adopted in 114 Fed. 189, 52 C. C. A. 145, and the principles involved in its application are set out in Fisher vs. Sharadin, 186 Pa. 568, 40 Atl. 1091, and Boyle vs. Mahanoy City, 187 Pa. 1, 40 Atl. 1093. Under the Conformity Act this practice has long been followed in the Federal Courts in Pennsylvania and met with the approval of this court in Carstairs vs. American Bonding & Trust Co., 116 Fed. 449, 54 C. C. A. 85. Subsequently the Act of April 22, 1905 (P. L. 286) was passed, which provides:

"That whenever, upon trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the Court shall allow, move the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; where-

upon it shall be the duty of the Court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the Court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the Court below, and enter such judgment as shall be warranted by the evidence taken in that court."

And its provisions have been adopted and followed in the practice in the United States courts in this State and approved, as we have seen, by this court in Fries-Breslin Co. vs. Bergen, *supra*.

That this practice results in but one trial and a final judgment on review is sound ground for the Federal Courts of this State conforming to the State's statutory practice. That this practice saves retrials and permits a final judgment when the case is reviewed shows its practical administrative worth. *Interest reipublicae ut sit finis litium*. That the Statute is of the kind to which the Conformity Act applies we are clear. Townsend vs. Jemison, 48 U. S. 706, 12 L. Ed. 880; Sawin vs. Kenny, 93 U. S. 289, 23 L. Ed. 926; Bond vs. Dustin, 112 U. S. 607, 5 Sup. Ct. 296, 28 L. Ed. 835; Ft. Scott vs. Eads, 117 Fed. 51, 54 C. C. A. 437.

The judgment of the Court below is therefore reversed and the case will be remanded, with directions to enter judgment *non obstante veredicto* in favor of the defendants"

See also to the same effect *MacCord vs. Baltimore & Ohio R. R. Co., 187 Fed. Rep. 443.*

And *Delaware, Lackawanna & Western R. R. Co. vs. Troxell, 183 Fed. Rep. 373.*

In the cases of *Central Transportation Co. vs. Pullman, 139 U. S. 40*, and *Coughran vs. Bigelow, 164 U. S. 308*, it is held that under the United States Statute of 1872 the United States courts sitting in Pennnsylvania are bound by the practice as to non suits regulated by the State Statute. By analogy the Court should hold that United States Courts sitting in Pennsylvania are equally required to follow the practice with reference to judgments *non obstante veredicto* prescribed by the Act of 1905.

There was no invasion in this case of the province of the jury. The Circuit Court of Appeals found that the case was one which would have required the judge to direct a verdict for the defendant on the ground of contributory negligence. That being the case the Court should have entered judgment for the defendant *non obstante veredicto* and failing to do so should be reversed.

The applicability of the Seventh Amendment to the Constitution to this practice, turns upon the

construction to be given to the word "re-examined" in the clause

> "And no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Does the action of the Court of Appeals in this case constitute a re-examination of the facts found by the jury?

We contend that it does not, but that it is essentially a re-examination of the question of law which was submitted to the Court in the defendant's requests for charge to the jury, namely, the question of law—whether there was any evidence in the case which would sustain a verdict in favor of the plaintiff.

The Act of 1905 is an outgrowth and extension of the practice long prevailing in the Courts of Pennsylvania, and not inconsistent with the common law, by which the Court in submitting a case to a jury reserves certain questions of law, and the verdict is rendered not as a general verdict but one special in its character and subject expressly or by implication to the questions of law reserved for the consideration of the Court.

Delmas vs. Kemble, 215 Pa. 410.

The Court does not, under this practice, review or re-examine the testimony to ascertain whether

the jury correctly found the issues of fact or awarded adequate or excessive damages, but it considers all of the evidence in the case, which is made by the Statute a part of the record, when properly certified, for the purpose of reviewing the question which the points presented by the defendant required it to pass upon at the conclusion of the trial, namely, whether there was sufficient evidence in support of plaintiff's claim to submit to the jury. This is purely a question of law and not of fact.

The case of the *Southern Pacific Company vs. Pool, 160 U. S. 438*, illustrates very clearly the position that we take in this case. It was a suit brought to recover for the death of one Pool alleged to have been caused by the negligence of an employe of the defendant. At the conclusion of the trial the defendant requested the Court to give peremptory instructions in its favor, which, being refused, exception was taken. The Court submitted to the jury two questions,—first, as to what employe of the defendant was guilty of negligence, and, second, whether deceased used reasonable care and precaution to avoid injury. The jury answered the first question, "Kilpatrick," the second question, "yes." An appeal was taken to the Supreme Court of the Territory of Utah, where the judgment was affirmed. The case was then brought into this court. The Court, White, J. (p. 440), says as follows:

> "Was the accident caused by the negligence of Pool?

To answer this question involves an analysis of the evidence (which the record fully sets out), not for the purpose of weighing the testimony or of ascertaining the preponderating balance thereof, but in order to arrive at the undoubted proof, from which the legal consequence, negligence, results. There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. *There is also no doubt where the facts are undisputed or clearly preponderant that the question of negligence is one of law. Union P. R. Co. vs. McDonald, 152 U. S. 262* (38:434). The rule is thus announced in that case (p. 283 (443): "Upon the question of negligence . . . the Court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Delaware, Lackawanna & Western R. Co. vs. Converse, 139 U. S. 469, 472* (35:213, 215), and authorities there cited: *Elliott vs. Chicago, M. & St. P. R. Co., 150 U. S. 245* (37:1068); *Anderson County Comrs. vs. Beal, 113 U. S. 227, 241* (28:966,971)."

The judgment was reversed and the case remanded with directions to grant a new trial.

There can be no possible doubt that under the rulings of this court, the trial court in this case had power to, and under the defendant's requests for charge, if in accordance with the facts, was bound to, direct a verdict for the defendant at the close of the trial.

> "It is the settled law of this Court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is not sufficient to support a verdict if returned, which, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendants."

Schofield vs. Railroad, 114 U. S. 615-616.

> "It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by the jury, yet when the undisputed evidence is so conclusive that the Court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

Elliott vs. Railroad, 150 U. S. 245-246. Brown, J.

As is fully explained by Chief Justice Mitchell in the case of *Delmas vs. Kemble, supra*, the purpose of the practice of receiving verdicts subject to reserved points, enlarged by the Act of 1905, was to

give the Court leisure to consider fully and intelligently the question of its right and duty to direct a verdict without the necessity of subjecting the parties and the Commonwealth to the trouble and expense of a second trial.

Conceding that it has been held by this Court that the words, "common law" in the Seventh Amendment, referred to the common law of England and not that of the several States, it is not clear that the common law of England does not permit the entry of judgment for defendant *non obstante veredicto*. The subject is ably discussed in an article by William A. Moury, 14 American Law Review, 494, with citations from a number of English decisions, among them the following:

Rand vs. Vaughan, 1 Bing. N. C. 767. 27 Eng. C. L. R. 568; Regina vs. Governor of Darlington School, 6 Q. B. 704. 57 Eng. C. L. R. 703; Benson vs. Duncan, 3 Exch. 652.

The result of the article is to reach the conclusion that the principles applied and recognized in the English courts under which judgments *non obstante veredicto* were sometimes rendered for the plaintiff, were equally applicable and would in proper cases have been applied to the cases of defendants similarly situated, and that the statements sometimes appearing in decided cases, in textbooks and encyclopaedias to the effect that under the English common law such judgments were entered only for plaintiffs and never for defendants, are unwarranted.

This, we contend, does not involve re-examination by the Court of the facts, but the review of the law which compels the plaintiff in a negligence case to prove damages suffered by reason of the negligence of the defendant under circumstances free from the charge of contributory negligence by the plaintiff.

SECOND: INDEPENDENTLY OF THE ACT OF ASSEMBLY OF 1905 THE CIRCUIT COURT OF APPEALS HAD POWER TO REVERSE THE JUDGMENT UPON THE DEFENDANT'S FOURTH SPECIFICATION OF ERROR IN THE CAUSE AS IT CAME BEFORE THAT COURT.

The opinion of the Circuit Court of Appeals concludes as follows (R. 445):

> "Her" (Mrs. Flannelly's) "uncontradicted statements disclose contributory negligence on her part. There was nothing in the case to warrant a verdict based upon an absence of all contributory negligence. As there was nothing to warrant such a verdict the motion for judgment *non obstante veredicto* should have been granted. The judgment below must be reversed, with costs, and it is so ordered."

The Fourth Assignment complains of the Court's refusal to charge the jury, as follows (R. 42):

"Fourth: The evidence conclusively establishes negligence upon the part of the plaintiff, Mary Flannelly, which contributed to her injuries, if she received any, and therefore the verdict must be for the defendant."

The Circuit Court of Appeals in its opinion, as above cited, says:

> "Her uncontradicted statements disclose contributory negligence on her part."

Consequently, if it had been argued by the petitioner here that the Court below had no right to grant a rule for judgment *non obstante veredicto* and that the Circuit Court of Appeals had no right to review its disposition of such a rule, the result would evidently have been that the Fourth Assignment of Error would have been sustained and the same judgment of reversal entered.

All of the assignments of error in substance complain that the case made out by the plaintiff's did not justify its submission to the jury, but that binding instructions for the defendant should have been given. The Court of Appeals sustained this position, and it is a matter of no moment in what form of words it expresses its conclusion. After a careful and conscientious review of the theory and evidence of the plaintiff, disregarding altogether the evidence upon the part of the defendant, the Court of Apepals reached the conclusion that under the plaintiff's own showing she was guilty of such contributory negligence as barred a recovery. Having reached this conclusion, there

was nothing to do but reverse the judgment and enter judgment for the defendant.

If it was the duty of the trial court, on the hearing of the rule for judgment *non obstante veredicto*, to find that there was no evidence in the case which would sustain a verdict in favor of the plaintiff and to set aside the verdict, the failure of the Court to take such action was error, which was reviewable upon proper presentation to the Appellate Court, and warranted a reversal.

THIRD—THE CIRCUIT COURT OF APPEALS HAVING FOUND VITAL ERROR IN THE SUBMISSION OF THE CASE TO THE JURY, COULD AT LEAST HAVE REVERSED WITH *VENIRE FACIAS DE NOVO*, AND SHOULD STILL BE GIVEN THE OPPORTUNITY TO ENTER SUCH JUDGMENT IF THIS COURT SHOULD FIND THAT THE JUDGMENT AFTERWARD ENTERED IN FAVOR OF THE DEFENDANT WAS ERRONEOUS.

Commenting upon the Seventh Amendment in its application to a certain state of facts, this Court said in *Parsons vs. Bedford*, 3 Peters 443-448:

> "The only modes known to the common law to re-examine such facts are the granting of a new trial by the Court where the issue was tried or to which the record is properly returnable,

> or the award of a *venire facias de novo* by the appellate court for some error of law which intervened in the proceedings."

To the same effect—*Capital Traction Co. vs. Hof, 174 U. S. 1-3,*
and other cases therein cited.

As argued under our second head, the Circuit Court of Appeals has found clearly that the trial court erred in refusing to affirm the defendant's Fourth request for charge to the jury. That error being found, it was the duty of the Circuit Court of Appeals to reverse the judgment. Should the position of the petitioners in this Court be sustained and should it be found that the Circuit Court of Appeals in so reversing had no power to enter judgment for the defendant, its power and duty would still remain to reverse the judgment with *venire facias de novo.*

This seems substantially conceded by the petitioners in their brief (page 4), as follows:

> "The cardinal point here is that the appellate court, instead of granting a new trial, has ordered judgment for the defendant, notwithstanding that a jury had rendered a verdict for the plaintiffs."

Upon their own presentation of the case, therefore, the utmost that they seek from this Court is a reversal of the judgment of the Circuit Court of

Appeals with directions that in reversing the judgment a *venire facias de novo* should be awarded.

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"EXHIBIT A."

"AN ACT authorizing the courts of this Commonwealth to certify the evidence and enter judgment upon the whole record, whenever a request for binding instructions has been reserved or declined by the trial judge; and authorizing appeals from the judgment so entered, and the entry of the proper judgment in the Supreme or Superior Court."

Section 1. Be it enacted, etc., That whenever, upon the trials of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the Court in that regard. From the judgment thus entered, either party may appeal to the Supreme or Superior Court as in

other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court.

"Approved the 22nd day of April, A. D. 1905."

In this case, *held* that the evidence on the question of contributory negligence of a woman crossing a dangerous railroad crossing was properly submitted to the jury, and that there was evidence from which the jury could well have found, as they did, that she was not negligent.

172 Fed. Rep. 328, reversed.

THE facts, which involve the question of negligence of a railroad company and degree of care required by one crossing a track, are stated in the opinion.

Mr. Frank W. Hackett and *Mr. Paul J. Sherwood* for petitioners:

No question of law was before the Circuit Court of Appeals; no bill of exceptions had been signed. The case went up on exceptions to the court's overruling defendant's motion for judgment for defendant notwithstanding the verdict for plaintiff and such a motion is unknown to the common law. Freeman on Judgment, § 7; *Smith* v. *Power*, 15 N. H. 546; *German Insurance Company* v. *Frederick*, 7 U. S. App. 122.

The Circuit Court of Appeals reëxamined the fact of alleged contributory negligence on the part of plaintiff. This procedure in a court of the United States is forbidden by the Seventh Amendment to the Constitution. *Parsons* v. *Bedford*, 3 Pet. 433; *Capital Traction Co.* v. *Hof*, 174 U. S. 1. Consult remarks of Matthews, J., in *Metropolitan R. R. Co.* v. *Moore*, 121 U. S. 537.

The presiding judge carefully instructed the jury to the effect that plaintiff could not recover if she had been negligent, the question of whether she was negligent was submitted to the jury, upon conflicting testimony; the jury found a verdict for plaintiffs and the presiding judge refused to set that verdict aside, on motion for a new trial. The Circuit Court of Appeals erred in treating the question of negligence as a question of law. That court had no jurisdiction to enter upon a review of the entire testi-

mony. Such action was not in accordance with the rules of the common law, as understood at the time when the Seventh Amendment to the Constitution was adopted.

Mr. James H. Torrey, with whom *Mr. W. S. Opdyke* and *Mr. Lewis E. Carr* were on the brief, for respondent:

The Pennsylvania act of 1905 is a valid act applicable by the Conformity Act of Congress to courts of the United States within the State of Pennsylvania. *Delmas* v. *Kemble*, 215 Pa. St. 410; *Joyce* v. *Balto. & Ohio R. R.*, 230 Pa. St. 1; *Rocap* v. *Bell Telephone Co.*, 230 Pa. St. 597; *Fries-Breslin Co.* v. *Bergen*, 168 Fed. Rep. 360; *Smith* v. *Jones*, 181 Fed Rep. 819; *S. C.*, 104 C. C. A. 329.

The practice of entering judgments *non obstante veredicto* has long existed in Pennsylvania. *Casey* v. *Pennsylvania Asphalt Co.* 109 Fed. Rep. 746, adopted in 114 Fed. Rep. 189, *S. C.*, 52 C. C. A. 145; *Fisher* v. *Sharadin*, 186 Pa. St. 568, *S. C.*, 40 Atl. Rep. 1091; *Boyle* v. *Mahanoy City*, 187 Pa. St. 1, *S. C.*, 40 Atl. Rep. 1093; *Carstairs* v. *American Bonding & Trust Co.*, 116 Fed. Rep. 449, *S. C.*, 54 C. C. A. 85.

The provisions of the act of 1905 have been adopted and followed in the practice in the United States courts in Pennsylvania. The statute is of the kind to which the Conformity Act applies. *Fries-Breslin Co.* v. *Bergen, supra; Townsend* v. *Jemison*, 7 How. 706; *Sawin* v. *Kenny*, 93 U. S. 289; *Bond* v. *Dustin*, 112 U. S. 607; *Ft. Scott* v. *Eads*, 117 Fed. Rep. 51; *S. C.*, 54 C. C. A. 437. See also, *MacCord* v. *Balto. & Ohio R. R. Co.*, 187 Fed. Rep. 443; *Delaware, L. & W. R. R. Co.* v. *Troxell*, 183 Fed. Rep. 373.

Under the act of Congress of 1872, the United States courts sitting in Pennsylvania are bound by the practice as to non-suits regulated by the state statute. *Central Transp. Co.* v. *Pullman*, 139 U. S. 40; *Coughran* v. *Bigelow*, 164 U. S. 308. By analogy the United States courts sitting in Pennsylvania are equally required to follow the

practice with reference to judgments *non obstante veredicto* prescribed by the act of 1905.

The action of the Court of Appeals in this case does not constitute a reëxamination of the facts found by the jury, prohibited by the Seventh Amendment to the Constitution of the United States. *Delmas* v. *Kemble*, 215 Pa. St. 410; *Southern Pacific Co.* v. *Pool*, 160 U. S. 438.

There can be no doubt that where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt where the facts are undisputed or clearly preponderant that the question of negligence is one of law. *Union P. R. Co.* v. *McDonald*, 152 U. S. 262; *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 472, and authorities cited; *Elliott* v. *Chicago, M. & St. P. R. Co.*, 150 U. S. 245; *Anderson County Comrs.* v. *Beal*, 113 U. S. 227, 241.

The trial court in this case had power to, and under the defendant's requests for charge, if in accordance with the facts, was bound to, direct a verdict for the defendant at the close of the trial. *Schofield* v. *Railroad*, 114 U. S. 615, 616; *Elliott* v. *Railroad*, 150 U. S. 245, 246.

Even though the words "common law" in the Seventh Amendment referred to the common law of England and not that of the several States, it is not clear that the former does not permit the entry of judgment for defendant *non obstante veredicto*. *Rand* v. *Vaughan*, 1 Bing. N. C. 767, 27 Eng. C. L. R. 568; *Regina* v. *Governor of Darlington School*, 6 Q. B. 704, 57 Eng. C. L. R. 703; *Benson* v. *Duncan*, 3 Exch. 652.

Independently of the act of 1905, the Circuit Court of Appeals had power to reverse the judgment upon the defendant's fourth specification of error in the cause as it came before that court.

The Circuit Court of Appeals having found vital error in the submission of the case to the jury, it could at least

have reversed with *venire facias de novo*, and should still be given the opportunity to enter such judgment if this court should find that the judgment afterward entered in favor of the defendant was erroneous. *Parsons* v. *Bedford*, 3 Pet. 443–448; *Capital Traction Co.* v. *Hof*, 174 U. S. 1–3.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages for injuries and loss occasioned, as was alleged, by negligence of a railroad company resulting in the collision of one of its trains with a vehicle passing over a grade crossing in Pennsylvania. The negligence charged against the defendant was the failure to give due and timely warning of the approach of the train, and the defense interposed was the freedom of the defendant from the negligence charged, and the failure of one of the plaintiffs, who was driving the vehicle, to take reasonable precautions, before attempting to drive over the crossing, to ascertain whether she could do so in safety. In the Circuit Court there was a verdict and judgment for the plaintiffs, and the defendant took the case on a writ of error to the Circuit Court of Appeals. That court treated the record as presenting, in substance, two questions: First, whether there was any substantial evidence of actionable negligence on the part of the defendant, and, second, whether the evidence conclusively established the defense of contributory negligence. Upon examining the evidence purporting to be set out in the record, the Circuit Court of Appeals answered the first question favorably to the plaintiffs and the second favorably to the defendant, and accordingly reversed the judgment. 172 Fed. Rep. 328. The case was then brought here on a writ of certiorari granted on the petition of the plaintiffs.

Assuming, but without so deciding, that the state of the record was such as to justify the Circuit Court of Appeals in examining the evidence and determining whether it conclusively established the defense of contributory negligence, we come to consider whether that question was rightly decided.

As is often true in such cases, some matters were not disputed at the trial, while others were the subjects of conflicting testimony or of testimony from which different inferences reasonably could be drawn. The matters not disputed were these: The injury occurred in the daytime, at a grade crossing in a small country village. The defendant's tracks, which were three in number, ran in a northerly and southerly direction and crossed the highway at right angles. About 700 feet south of the crossing the tracks curved to the west, and when cars were occupying the east track south of the crossing a traveler on the highway east of the crossing could not see a train approaching from the south on either of the other tracks. Mrs. Flannelly, one of the plaintiffs and wife of the other, had occasion to drive along the highway from her home, a few miles east of the railroad, to a point on the other side of it. Seated in the vehicle with her were two small boys. As she neared the crossing a freight train was approaching on the east track from the north. She stopped about 40 feet from that track and waited for the train to pass, which took some time, as it was long and moving slowly. Before this train obscured the view she looked along the tracks to the south and observed that no train was in sight coming from that direction. After the rear of the freight train passed about 150 feet beyond the crossing she drove to the first track, or near it, and, on looking in both directions and seeing no train approaching, started to drive over the tracks. Her view at that time extended 300 feet or more to the south along the second track. As she was passing over that

track a passenger train approaching thereon from the south sounded a sharp danger signal, and soon struck a rear wheel of her vehicle, thereby wrecking the latter, inflicting bodily injuries on her, and killing one of the boys. The train was moving at a rate of from 50 to 60 miles an hour, or from 73 to 88 feet per second. There was also testimony, more or less disputed, from which the jury reasonably could have found that no whistle was sounded by the passenger train at the place where such a warning of its approach was usually and properly given; that the freight train came to a stop before Mrs. Flannelly drove on the tracks; that she listened attentively for signals given by approaching trains, but heard none, other than the danger signal which came too late to be of avail; that her horse became restive and nervous before she advanced to the crossing; that when the danger signal was sounded by the passenger train the horse halted, reared and delayed their progress between five and ten seconds; and that as that signal was sounded she saw the passenger train emerge from a volume of smoke or steam which was hanging over the tracks to the south.

The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And, generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences reasonably may be drawn from it.

We think the evidence in this case, when tested by these standards, required that the defense of contributory negligence be submitted to the jury as a question of fact, as was done by the Circuit Court. The conclusion to the contrary in the Circuit Court of Appeals was rested upon

the theory that the freight train did not stop after clearing the crossing but continued in a southerly direction, thereby giving promise that the obstruction to the view along the tracks on that side of the crossing would quickly disappear. But a careful examination of the record satisfies us that there was evidence from which the jury could well have found that the train came to a full stop about 150 feet south of the crossing before Mrs. Flannelly started to cross over. If it did, she hardly could be declared negligent for failing to await its further movements, of which she knew nothing. Besides, if the action of her horse was as described, she ought not to be charged with negligence in not anticipating it.

Other questions were discussed at bar and in the briefs, but as, in the view which we take of the evidence examined by the Circuit Court of Appeals, the judgment of the Circuit Court should have been affirmed, the other questions need not be considered.

Judgment reversed.